
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

2:20 pm
FILED

JAN 14 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CLARENCE RAY ALLEN,

Plaintiff-Appellant,

vs.

STEVEN ORNOSKI, WARDEN OF THE CALIFORNIA STATE PRISON
AT SAN QUENTIN, AND THE ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA

Defendants-Appellees.

On Appeal From the United States District Court
for the Eastern District of California
The Honorable Frank C. Damrell, Jr.
(Case No. 2:06-CV-00064-FCD-DAD)

REPLY TO OPPOSITIONS

EXECUTION IMMINENT
January 17, 2006, at 12:01 A.M.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE RAY ALLEN,

Petitioner-Appellant,

v.

STEVEN ORNOSKI, Warden,

Respondent-Appellee,

CAPITAL CASE

**EXECUTION IMMINENT:
JANUARY 17, 2006
AT 12:01 A.M.**

**REPLY TO OPPOSITIONS TO PETITIONER'S MOTIONS FOR STAY OF
EXECUTION AND OTHER MOTIONS**

A. Introduction.

Petitioner filed with this Court on January 13, 2006, various motions arising out of the district court's order filed January 12, 2006, denying his petition for writ of habeas corpus in Case No. 06-99001 challenging his execution set for January 17, 2005. Respondent has opposed them in two separate pleadings, both of which Petitioner replies to hear.

B. The Merits of Petitioner's Constitutional Challenge to His Execution as Cruel and Unusual Punishment.

The parties have thoroughly briefed this issue both in this Court and the court below. Petitioner rests on that briefing.

C. The Appeal Is Properly Before this Court.

Petitioner has moved for a COA as necessary to challenge the court's denial of his claim that his execution would inflict cruel and unusual punishment upon him. As the parties have previously pointed out, the court divided that claim into two parts, denying on the merits the component concerning his age and physical condition and dismissing the component concerning his extended tenure on Death Row for lack of jurisdiction. As Respondent's first pleading in opposition (Opp.) makes clear, to the degree that the district court dismissed Petitioner's claim for want of jurisdiction, the appeal is now properly before the Court without need of a COA. Opp., p. 9.

D. The Court Should Not Deem Petitioner's Constitutional Challenge to 28 U.S.C. § 2254 (d) Waived.

Respondent asserts that Petitioner has waived his constitutional challenge to the deferential standard of review set forth in § 2254 (d) because he did not raise it in the court below. Respondent's Supplemental Filing in Opp. (Supp. Opp.), pp. 2-3. As Respondent further acknowledges, however, this Court nevertheless has discretion to consider this argument. Supp. Opp., p. 4. Indeed, even when an

appellant raises an issue as late in the day as a petition for rehearing before this Court, it retains broad discretion whether to apply the waiver doctrine in these circumstances, and will dispense with it in "extraordinary circumstances." See, e.g., *Fleming v. Department of Public Safety*, 837 F.2d 401, 405, n.2 (9th Cir. 1988), quoting *Escobar Ruiz v. I.N.S.*, 813 F.2d 283, 286 (9th Cir. 1987), aff'd. 838 F.2d 1020 (9th Cir. 1988) (en banc) ("A case must involve 'extraordinary circumstances' to justify our consideration of issues first raised on petition for rehearing." [citations and inside quotes omitted]).

There are extraordinary circumstances here for the court to take the lesser step of considering the issue now on appeal, despite the fact that it was not raised in Petitioner's single pleading in the district court. The extreme press of time for submission of the petition to the district court caused counsel to overlook this issue when they filed the petition, and then they had no opportunity to correct that inadvertence when the court — do to the same extreme exigent circumstances of time — proceeded to act on the petition the same day, without providing an opportunity to Petitioner to file reply papers or be orally heard on the case. Finally, the stakes for Petitioner — his life — provide another extraordinary circumstance excusing whatever procedural irregularity there may be to the Court's consideration of this issue. See, e.g., *United States v. Sanchez-Rodriguez*,

161 F.3d 556 (9th Cir. 1998) (en banc) (reviewing court may consider issue not raised below if it is purely legal and the record is fully developed on it).

The issue is an important one. It is far from "settled in this circuit and elsewhere," as Respondent asserts. See Supp. Opp., p. 4. In fact, a panel of this Court recently has solicited briefing on just this question. See *Irons v. Carey*, 408 F.3d 1165 (9th Cir. 2005). Moreover, in *Duhaime v. Ducharme*, 200 F.3d 597, 601 (9th Cir. 2000), the Court noted that "the Supreme Court has not decided the specifically presented issue" Although Respondent cites *Williams v. Taylor*, 529 U.S. 362 (2000) to suggest otherwise, in fact "that issue was presented in the certiorari petition in *Williams v. Taylor*, but the Supreme Court denied certiorari on that question and neither of the two majority opinions in *Williams* addressed it." Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* (2005 ed.), vol. 2, pp. 1644-1655.

* * * * *

CONCLUSION

For these reasons, the Court should stay Petitioner's execution and grant the other relief requested by him.


Dated: January 14, 2006

Respectfully submitted,

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